Filed 10/20/16 P. v. Hobbs CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>RICHARD SCOTT HOBBS,<br>Defendant and Appellant. | E063779<br>(Super.Ct.No. RIF1207480)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jason L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

The People charged defendant Richard Scott Hobbs with forcible rape, sodomy, and sexual penetration, and lewd and lascivious conduct against his then 15-year-old daughter, Jane Doe (Doe). A jury found defendant guilty of misdemeanor battery as a lesser included offense of the first three charges, and guilty of lewd and lascivious conduct. Defendant appeals from his battery convictions, contending the trial court erred by not instructing the jury that consent of the victim is a defense to battery. Because under the facts of this case we conclude the trial court did not have a sua sponte duty to instruct the jury on the affirmative defense of consent, and defendant did not object to the battery instruction given to the jury or request a special instruction, we find no error and affirm the judgment.

## I.

## FACTS

In an amended information, the People charged defendant with one count of forcible rape against a minor aged 14 years or older (Pen. Code,[1] §§ 261, subd. (a)(2), 264, subd. (c)(2), count 1), one count of forcible sodomy against a minor aged 14 years or older (§ 286, subd. (c)(2)(C), count 2), one count of forcible sexual penetration against a minor aged 14 years or older (§ 289, subd. (a)(1)(C), count 3), and one count of lewd and lascivious conduct against a minor aged 14 or 15 years (§ 288, subd. (c)(1), count 4).

[1] All additional undesignated statutory references are to the Penal Code.

A. Prosecution Evidence.

In September 2012, then 15-year-old Doe lived in Perris with her mother, grandmother, and younger sister. Defendant, Doe's father, lived in Riverside. Doe described her relationship with defendant as "[c]lose but not super close," and testified she did not see him often. At that time, Doe was in an intimate relationship with a girlfriend.

On September 29, 2012, Doe and her sister visited defendant in Riverside and stayed the night at his house. Doe smoked marijuana with defendant that afternoon. That night, both girls slept in the same bed as defendant. Doe and her sister slept on the sides of the bed, and defendant slept in the middle. Doe's sister fell asleep first. Doe was on her phone texting, playing games, and using social media while defendant watched television. Doe was on her menstrual cycle that night. She was wearing a pair of her father's boxer shorts and sweatpants.

About one or two hours after her sister fell asleep, Doe and defendant were lying in bed when defendant sexually penetrated Doe's anus and vagina. While Doe was on her side, defendant put his arm around Doe's stomach and pulled her closer to him. Defendant lightly rubbed his thighs and penis against Doe's buttocks and then started to pull down her sweatpants. Doe's feminine pad got stuck, and defendant told her to remove it. Defendant stuck his penis in Doe's anus for about two minutes and moved his lower body back and forth. Doe did not say anything, and neither did defendant. Defendant then moved Doe's right leg, partially penetrated her vagina with his penis, and

at the same time penetrated her vagina with his fingers. Doe moved away from defendant because it hurt and said, "No." Defendant responded by giggling, and said, "I'm too big for you anyway." Doe pulled her sweatpants up, and defendant pulled his shorts up. At no time during the incident did Doe rub against defendant.

After defendant went to sleep, Doe got on her phone to check her Twitter account and then went to the bathroom. Doe did not call the police because she did not want her father to go to jail. She went back to the bed because she did not want anything to happen to her sister.

The next morning, Doe did not tell her sister what happened because she did not want to worry her. Doe removed the feminine pad she wore the night before and threw it away in an outside trash can. Later that day, Doe sent her girlfriend a text message. Doe told her girlfriend defendant had sex with her and she told defendant to stop. The girlfriend told Doe to go to a mutual friend's house in Riverside. Doe asked defendant to drive her, and he dropped Doe and her sister at the friend's house. Doe told her girlfriend what happened and began to cry. Doe's mother and grandmother were in San Diego, so the mutual friend's brother drove Doe and her sister back to their home in Perris.

Doe called her grandmother and said she had something she needed to tell her when the grandmother came home. At school the next day, Doe told her best friend defendant had raped her. The friend told the school counselor what Doe had told her. Later, Doe was summoned to the counselor's office. Doe told the counselor and a school resource officer what happened. After school, Doe went home and told her grandmother

her father had raped her. When the grandmother asked Doe "why . . . she let him," Doe replied she was afraid defendant might hit her.

Doe did not tell her mother about what happened until the next day because she was afraid her mother would kill defendant. Doe's mother took her the hospital later that day. Doe spoke to officers with the Riverside Police Department and told them what happened. Doe then underwent a rape examination at the hospital by a sexual assault nurse. Doe told the nurse her father penetrated her anus with his penis, then penetrated her vagina with his penis and fingers at the same time. She also told the nurse she had soreness in her vagina but felt no anal soreness. During the physical examination, the nurse observed ecchymosis, or bruising, to the opening of Doe's anus and red secretions in her rectum. The nurse opined the injuries she observed were consistent with Doe's statement that defendant had penetrated her anus with his penis, and were inconsistent with venous pooling, a darkening or swelling of the anal region caused by blood pooling. The nurse did not observe injuries to Doe's vagina, but she testified she would not always expect to see injury to the vagina after sexual intercourse.

Later that week, Doe met with Detective Cobb of the Riverside Police Department. The detective convinced Doe to make a recorded pretext phone call to defendant on October 3, 2012, to try and get him to make incriminating statements.

During the recorded conversation, which was played for the jury, Doe said to defendant, "I wanted to ask you why?" Defendant responded he had wanted to talk to Doe about what happened but her sister was there and he "didn't know what to say." Doe told defendant she stayed home from school that day because she was not feeling well

and she "was bothered." Defendant told Doe, "Can't believe I did it. I don't know it—that was stupid. And then I was, like, didn't know what to tell you, and I—how to talk to you about it, or what. And I—your sister kept comin' right there and I didn't wanna make, like, a big deal out of it." Defendant also said, "I mean, I'm—I'm sorry. I wanted to tell you. I wanted to talk to you, like, in person about it, but I didn't wanna say anything to you on the phone."

When Doe told defendant, "It hurts," he replied, "Nothin' even happened." Defendant asked what Doe meant when she said it hurt, and Doe replied, "It hurts like if I walk or if I, like, move a certain way." Defendant responded, "Well, it kinda would. Damn girl." Doe again told defendant she wanted to know why he did it. Defendant responded, "I don't know why. I barely remember that shit. We's just fuckin' layin' there, and—I don't know. I didn't even—I wasn't thinkin.' That's why I was being fuckin' stupid." He also said when he woke up, "I was, like, 'Holy shit, that fuckin' happen?,'" and later he was lying down and thought, "Fuck, man." Doe told defendant, "you're my dad so it's not good." Defendant replied, "I know I'm sorry babe—I[t] . . . should've never happen[ed]. I can't believe it happened. There was no excuse for it. I'm just glad it didn't, like, happen—actually happen." When Doe asked defendant what he meant when he said "it didn't happen," defendant replied, "What do you mean?" Doe replied, "No, 'cause you said it didn't happen. But it did happen. You had sex with me." Defendant responded, "No I didn't." He then told Doe, "Remember it's, like, you rubbed on me and then, like, you had a pad in. I told you to take the pad off, and then I started

rubbin' on you and you're, like, 'Nah, it hurts.' And then we just stopped." Doe replied, "No."

Defendant acknowledged what he did was wrong, but said he did not want Doe "to feel weird around me at all," and he would never touch her like that again. Defendant again said he did not know why he did it, but said it might have been because he was lonely and missed his girlfriend. When Doe said, "You hurt me," defendant told her not to be "tripped out and so hurt about it. It was an accident. I'm sorry and just, like, I know that sounds stupid, but I just don't—I don't know. I love you and that shit shouldn't [have] happened and it won't happen." Doe said, "So everybody keeps asking me, like, what's wrong. Er, I don't know what to say." Defendant responded, "don't tell anybody that crazy shit," and it "[s]ounds like a lot worse than it is." Defendant told Doe, "you [were] just layin' there with me and you were, like, rubbin' on me and then . . . I'm—I was, like—like, wasn't thinkin' about anything at the time. And I didn't mean to hurt you. I didn't mean to do anything that you didn't want me to do." When Doe said she did not rub on defendant, he replied, "[o]r rub against me or whatever you were doin'. I—I don't know. It's my fault. I'm not trying to make an excuse out of it." Doe asked if she could call defendant if she needed anything. Defendant asked, "Is it—I mean did it—is it hurting that bad or what?" Doe replied it hurt "just a little bit" but that she was still bleeding from her period.

A detective with the Riverside Police Department searched the outside trash can at defendant's house. The detective recovered feminine pads wrapped in toilet paper. A criminalist with the Department of Justice (DOJ) tested the feminine pads. One of the

pads tested positive for acid phosphatase, an enzyme found in high concentrations in seminal fluid that is also found in lower concentrations in other bodily fluids. Portions of both pads were later tested for DNA. A DOJ senior criminalist testified he found DNA on one of the pads that matched defendant's DNA to a near statistical certainty.

B. Defense Evidence.

Defendant testified Doe was affectionate with him and on prior occasions she slept in the same bed as him. Nothing "odd" or "weird" happened on those occasions, and she had not rubbed against him "in a weird way" before the night in question. On September 29, 2012, Doe's grandmother dropped Doe and her younger sister at a grocery store near defendant's house. Before going to bed, defendant's girlfriend told Doe and her younger sister she was pregnant. The girls were upset upon hearing this news.

Defendant, Doe, and her sister were lying in bed, eating snacks, and watching movies. Doe's sister fell asleep first, while defendant was lying next to her. Doe was on the floor using her phone. Defendant fell asleep around 11:00 p.m. Defendant was awoken several times by noise Doe was making on her phone. Defendant told Doe to get off her phone and come to bed. Doe was on the edge of the bed at first, but she then scooted and brushed against defendant. Doe continued to get closer to defendant, and defendant hugged her and kissed her on the top of her head.

Defendant testified that as he was starting to fall back asleep, Doe "started rubbing her butt" against defendant's crotch area and woke defendant up. At first, defendant thought Doe was just trying to get comfortable on the bed. However, Doe continued to rub against defendant, which made him feel uncomfortable. Defendant testified Doe

rubbed against him four to six seconds. Defendant then got out of the bed, walked downstairs, and went outside to smoke a cigarette. Defendant wondered to himself whether he was reading too much into the situation. Doe walked up and sat down about 10 feet from defendant and gave him a "puppy dog face." Defendant did not know what to say to Doe, so he told her, "Let's go back to sleep." The two walked back to the bedroom. Doe got into the bed, and defendant was lying on a beanbag. The next morning, defendant wanted to talk to Doe about what had happened, but he did not want to talk to Doe in front of her younger sister.

Defendant testified (1) neither he nor Doe had their pants down when she rubbed against him, (2) his penis was not erect or exposed from his pants, (3) he did not rub Doe back, and (4) although he hugged Doe, he did not touch her below her waist or touch her genitalia. Defendant also testified he did not insert his penis into Doe's anus or vagina, and he did not insert his finger into her vagina. Defendant denied he told Doe he was "too big for her," and testified he did not touch Doe's feminine pad or tell her to remove it. Defendant also testified that after he went back to sleep, he did not wake up and find his pants in a different position or fine he was on the bed instead of on the beanbag. Defendant testified he is a light sleeper and it is not possible he did something in his sleep that he would not remember. Doe acted normally the next day, and when defendant dropped off Doe and her sister at the friend's house she gave him a big hug.

On cross-examination, defendant testified he smoked marijuana or "spice" on the day of the incident, but denied he ever smoked marijuana with Doe. Defendant testified he felt Doe was rubbing on him to indicate "she wanted to be close to me in the wrong

manner." On redirect, defendant testified when he was interviewed by Detective Cobb after being placed under arrest, he told the detective (1) it was Doe who rubbed against him, (2) he did not have an erection, (3) he did not touch Doe's breasts or genitals, (4) he did not penetrate her anus or vagina with his penis, and (5) he never told Doe he was too big for her. On further cross-examination, defendant testified he "kind of claimed ownership" over the incident during the pretext phone call because he did not want Doe to feel uncomfortable.

A board certified sexual assault nurse examiner testified she reviewed the reports, photographs, and video from Doe's rape examination. The nurse disagreed with the finding that the bruising around Doe's anus was consistent with her statement that defendant penetrated her anus with his penis. Instead, the nurse opined what looked like bruising on Doe's anal region was most likely venous pooling or Doe's normal skin tone, and was not the result of penetration. On cross-examination, the nurse testified anal penetration does not always result in tearing or bruising.

A forensic scientist opined when Doe used the bathroom to change her feminine pad, she might have touched a surface or object with defendant's DNA on it and transferred the DNA to the pad, or the pad itself might have touched a surface containing defendant's DNA. He also testified defendant's DNA might have been transferred to the feminine pad from the pair of defendant's boxer shorts Doe was wearing. On cross-examination, the forensic scientist testified defendant's DNA might have been left on the feminine pad if he touched Doe's vaginal area with his penis.

C. Verdicts and Sentence.

A jury found defendant guilty of the lesser included offense of misdemeanor battery on counts 1 through 3 (§ 242), and guilty of lewd or lascivious conduct as alleged in count 4 (§ 288, subd. (c)(1)). The trial court denied defendant probation and sentenced him to the middle term of two years in state prison for the felony conviction on count 4, and to six months in county jail for each of the three misdemeanor battery convictions on counts 1 through 3, to run concurrently with the sentence on count 4, for a total of two years in state prison. Defendant was given 22 days credit toward his sentence for time in custody and 22 days good conduct credit, for a total of 44 days. Defendant was ordered to immediately register as a sex offender upon his release from custody.

Defendant timely appealed.

II.

DISCUSSION

Defendant argues the trial court had a sua sponte duty to instruct the jury consent is a defense to battery and failure to do so was prejudicial and requires reversal of his three misdemeanor convictions.[2] Defendant did not object that the battery instruction read to the jury was incomplete or request a special instruction on the defense of battery. Because the evidence did not support a consent instruction, and giving such an instruction

[2] Defendant does not challenge his felony conviction for lewd and lascivious conduct or the two-year prison sentence for that conviction.

would have conflicted with defendant's actual defense in this case, we conclude the trial court had no sua sponte duty to give a consent instruction.

A. Additional Background.

Defense counsel requested the jury be instructed on the lesser included offenses of battery (§ 242) and assault (§ 240). During a discussion of jury instructions, the trial court indicated it would instruct the jury on the lesser included offense of battery for counts 1 through 3, but it would not instruct on assault. When the court asked defense counsel if she wished to be heard on the battery instruction (CALCRIM No. 960), she answered, "No, your honor."

The trial court instructed the jury with a modified CALCRIM No. 960 as follows: "A lesser included crime to the crimes charged in Count 1, 2, and 3 is the crime of . . . battery in violation of Penal Code section 242. To prove that defendant is guilty of this crime, the People must prove that, number one, the defendant willfully touched [Doe] in a harmful or offensive manner. [¶] Someone commits an act willfully when he does it willingly or on purpose. It is not required that he intend to break the law, hurt someone else, or gain any advantage. The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through her clothing, is enough. The touching does not have to cause pain or injury of any kind."

During her closing argument, defense counsel argued Doe lied and made up the story about being raped because she was upset that defendant's girlfriend was pregnant. Defense counsel pointed to Doe's testimony that she asked defendant to stop, and he complied. This, according to defense counsel, showed there was no force, violence, or

duress, and that Doe's "story" was one of "consensual sex." Nonetheless, defense counsel did not argue what happened was consensual sex between defendant and Doe. Instead, defense counsel pointed to defendant's consistent testimony that there was "no erection, no sex," and "[s]ex didn't happen." Defense counsel also argued the scientific evidence showed there was no rubbing against Doe's genitalia. Finally, defense counsel argued the prosecutor had not proved any of the elements of the charged crimes, and the evidence proved that "what [Doe] says didn't happen."

B. Analysis.

Defense counsel did not object that the modified CALCRIM No. 960 read to the jury was incomplete or request the trial court give the jury a special instruction on the defense of consent to simple battery. Generally speaking, failure to object to an instruction as incomplete or to request a pinpoint instruction forfeits an appellate challenge to the instruction. (*People v. Johnson* (2015) 60 Cal.4th 966, 993.) However, even in the absence of an objection we may review the correctness of an instruction if error would affect the defendant's substantial rights. (§ 1259; *People v. Johnson*, at p. 993.)

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.]'" (*People v. Smith* (2013) 57 Cal.4th 232, 239.) "The trial court must instruct sua sponte as to defenses '"'that the

defendant is relying on . . . or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'"' [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1224.)

Ordinarily, consent of the victim is not a defense unless lack of consent is an element of the crime. (1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Defenses, §§ 97-98, pp. 544-546.) A number of sex crimes expressly include the element that the act be accomplished against the victim's will. (E.g., § 261, subd. (a)(2) [forcible rape], § 286, subd. (c)(2)(A)-(C) [forcible sodomy], § 288a, subd. (c)(2)(A)-(C) [forcible oral copulation], § 289, subd. (a)(1)(A)-(C) [forcible sexual penetration], § 243.4, subd. (a) [sexual battery].) "'"[A]gainst the will" of the victim is synonymous with "'without the victim's consent.'" [Citations.]'" (*People v. Andrews* (2015) 234 Cal.App.4th 590, 602 [sexual battery]; see CALCRIM Nos. 935, 938.)

Lack of the victim's consent is not, however, an element of simple battery. "Battery is statutorily defined as 'any willful and unlawful use of force or violence upon the person of another.' (§ 242.) Thus, the crime of battery has two elements: (1) a use of force or violence that is (2) willful and unlawful. The first element is satisfied by any touching. [Citation.] The second element of battery, willfulness and unlawfulness, is satisfied by any touching that is harmful or offensive. [Citation.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 408.) Battery is a general intent crime. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1220; *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495.) "As with all general intent crimes, 'the required mental state entails only an intent to do the act that causes the harm . . . .'" (*People v. Lara* (1996) 44 Cal.App.4th 102, 107, quoting *People*

*v. Davis* (1995) 10 Cal.4th 463, 519, fn. 15.) For purposes of battery in violation of section 242, "'willful'" means "simply a purpose or willingness to commit the act . . . ." (§ 7, subd. 1; see *People v. Lara*, at p. 107.)

Although lack of consent is not an element of simple battery, at least one appellate court has suggested the victim's consent to a battery is an affirmative defense that must be raised and proven by the defendant.[3] (*People v. Sanchez* (1978) 83 Cal.App.3d Supp. 1, 3-4; see Levenson & Ricciardulli, Cal. Criminal Law (The Rutter Group 2015) Crimes Against the Security of the Person, § 6:33, pp. 6-37–6-38.) Assuming consent of the victim is a defense to simple battery, defendant did not request a consent instruction so the trial court had a sua sponte duty to give one to the jury only if substantial evidence supported the defense of consent *and* the defense of consent was not inconsistent with the defense defendant presented at trial. (*People v. Rangel*, *supra*, 62 Cal.4th at p. 1224.)

First, there was no substantial evidence to support a consent instruction. Doe testified defendant pulled her close to him, rubbed his thighs and penis against her buttocks, penetrated her anus with his penis, and penetrated her vagina with his penis and fingers. Doe then pulled away and said, "No." Doe denied she ever rubbed against defendant. Defendant testified Doe rubbed against him in what he considered to be an inappropriate way, and he immediately got out of bed. However, defendant did not

---

[3] Defendant does not argue his intent to commit a battery was negated by a good faith but mistaken belief that Doe consented to a touching (§ 26, subd. Three) and, therefore, he does not contend the trial court was required to instruct the jury with a *Mayberry* instruction on the lesser included offense of battery. (*People v. Mayberry* (1975) 15 Cal.3d 143, 154-155; see *People v. Williams* (1992) 4 Cal.4th 354, 360-362.)

testify he had consensual sex with Doe or that she consented to him rubbing against or touching her genitals. Instead, defendant adamantly denied (1) his pants were ever down, (2) his penis was exposed or erect, (3) he ever rubbed against Doe's buttocks or genitals, (4) he penetrated Doe's anus or vagina with his penis or fingers, or (5) he touched Doe's genitals or feminine pad.

Moreover, a consent instruction would have conflicted with defendant's actual defense in this case. As noted, *ante*, during closing arguments, defense counsel argued Doe was a biased witness who made up her rape story because she was upset defendant's girlfriend was pregnant. Although defense counsel characterized Doe's "story" as one about consensual sex, as opposed to one of forced sex, defense counsel did not argue to the jury defendant had consensual sex with Doe. Instead, defense counsel argued the evidence proved there was "no erection, no sex," "[s]ex didn't happen," and what Doe claimed "didn't happen." Giving an instruction that Doe's consent to a harmful or offensive touching was a defense to battery would have clearly conflicted with defendant's sole defense—that he never touched Doe, consensually or otherwise.

Because defendant did not object to the battery instruction as incomplete or request a special instruction on the defense of consent, and because we conclude the trial court had no sua sponte duty to instruct the jury that consent is a defense to simple battery, we find no error.

## III.

## DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.